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In the
Supreme Court of the United States
OCTOBER TERM, 1953

W. H. WILSON, Executor of the Estate of Birdine Fletcher, Deceased, and SISTERS OF ST. FRANCIS, a corporation,
Petitioners,

VERSUS

A. J. SIMLER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF

PETITION

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

This case involves a question of public interest, and presents an unusual situation, in that the residuary clause of a will containing a devise to charitable institutions is held void because it is claimed the parent corporation of such institutions cannot take under the will.

Birdine Fletcher left a will containing a residuary clause by which she left the residue or bulk of her estate to St. Anthony Hospital, of Oklahoma City, Oklahoma, St.

Francis Hospital and Mount Alverno Convent, both of Maryville, Missouri (R. 4-7). Decedent's brother, A. J. Simler, brought an action for a declaratory judgment (R. 2-4) in the District Court for the Western District of Oklahoma, while the will was in process of being probated in the County Court of Oklahoma County and a contest on the will was being waged in the courts of the State, asking the Court to construe the will and to determine whether or not under Oklahoma law the defendant religious corporation, Sisters of St. Francis, owner of the residuary legatees, can receive and hold certain real estate situated outside the corporate limits of any city or town.

W. H. Wilson, Executor, and Sisters of St. Francis, a corporation, respectfully pray for a writ of certiorari to be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Tenth Circuit, rendered on the 9th day of November, 1953, reversing a judgment of the United States District Court for the Western District of Oklahoma, which held that only the State can question the right of the corporation to take real estate under the residuary clause in the will, and dismissing respondent's petition as an heir at law for a declaratory judgment that the residuary clause in the will was void.

OPINIONS BELOW

The opinion of the District Court is reported in 110 F. Supp. 761. The opinion of the Court of Appeals was filed

November 9, 1953 (R. 29-38), and petition for rehearing denied March 3, 1954 (R. 42) (not yet officially reported).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

STATE STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix, *infra*, pages I to VII.

QUESTIONS PRESENTED

I.

This case is not within the equity jurisdiction of the Federal Court.

II.

Whether an heir, in an action for a declaratory judgment, can attack a devise to a charitable corporation, under the law of Oklahoma, upon the ground that it is incapable of taking and holding real estate.

III.

The opinion is in conflict with decisions rendered by the Supreme Court of the State.

IV.

The opinion is in conflict with decisions of the Tenth Circuit, the District of Columbia Circuit, and the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

I.

The decision is of importance in the administration and distribution of estates. Settlement of the question by this Court is clearly in the public interest, since it is likely to arise in every probate proceeding, including many hundreds now pending, where gifts or devises are made to religious, educational and benevolent corporations.

II.

The decision of the court below is believed to be erroneous, and decides an important question of local law in a way that is in conflict with applicable local decisions.

III.

The decision of the court below disregards the substantive law of Oklahoma and a settled policy of long standing, and is in conflict with many decisions of the Supreme Court of the State.

IV.

The final decision of the court below should have been stayed until the relevant state issues can be determined by the state courts of Oklahoma.

Wherefore, It is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit should be granted.

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April, 1954.

BRIEF IN SUPPORT OF PETITION

DECISIONS BELOW

The opinion of the District Court is reported in 110 F. Supp. 761. The opinion of the Court of Appeals was filed November 9, 1953 (R. 29-38), and petition for rehearing denied March 3, 1954 (R. 42) (not yet officially reported).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

STATE STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix, *infra*, pages I to VII.

STATEMENT OF THE CASE

Birdine Fletcher died testate in Oklahoma County, Oklahoma, leaving A. J. Simler, her brother, one dollar, and, with the exception of a few small legacies, the balance of her estate to charity. Probate of the will was contested and the contest denied by the County Court (R. 14-15). An appeal was taken to the State District Court where the will was again upheld and the action by the County Court affirmed. While the case was pending in the District Court of Oklahoma County, contestant commenced an action in the Federal District Court for the Western District of Oklahoma for a declaratory judgment, in which it was alleged that the residuary clause of the will was invalid,

and asked that the same be declared void for want of capacity of the devisees to take, and further alleged that the County Court did not have authority to construe or interpret said will (R. 2-4).

A part of the residuary estate includes a 160-acre farm with oil production thereon, amounting to approximately $2,800.00 per month; the land is not of much value without the minerals thereunder.

The trial court stated the issues as follows: "Complaint * * * requesting a decree of this Court construing the will * * * and determining whether or not under Oklahoma law the defendant religious corporation, Sisters of St. Francis, can receive and hold certain real estate * * * outside the corporate limits of any city or town," and held:

> "It is the opinion of this Court that even though a testatrix devises real estate to a religious corporation which in fact is not necessary and proper for the carrying on of its business that such a devise is not void but voidable; only the state can question the right of the corporation to hold * * * and inasmuch as the plaintiff is not the proper party to question the defendant corporation's right to benefit from the devise in question, this action will be dismissed."

The lower court reversed the trial court, and held that the plaintiff can maintain the suit, and said:

> "This will did not take effect until the death of the testatrix. At that time, the corporate residuary legatee under her will was expressly and utterly forbidden by the constitution and the statute to take, acquire, hold or own the land in controversy. And the land not being legally and effectively devised, no title vested in the

devisees. Instead, title immediately passed under the law of descent and vested in the appellant as the sole heir at law of the decedent. *In re McGraw's Estate,* 111 N. Y. 66, 19 N. E. 233; *House of Mercy* v. *Davidson,* 90 Tex. 529, 39 S. W. 924; *Proctor* v. *Board of Trustees of Methodist Episcopal Church, South,* 225 Mo. 51, 123 S. W. 862; *Compton* v. *Moore,* 156 Ky. 544, 161 S. W. 540; *Kennett* v. *Kidd,* 87 Kan. 652, 125 Pac. 36."

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred:

I.

In holding that this case is within the equity jurisdiction of the Federal Court.

II.

In reversing the decision of the District Court, and holding that an heir can question the right of a corporation to take and hold a devise of real estate.

III.

In holding that the corporate residuary legatee under decedent's will was expressly and utterly forbidden by the Constitution and the Statutes of Oklahoma from taking, acquiring, and holding or owning the land in controversy.

IV.

The Court erred in failing to give consideration to the exception contained in Article XXII, Section 2, of the Oklahoma Constitution, also carried in Section 1.20 of the Business Corporation Act, to-wit: That a corporation may take, acquire, hold or own real estate outside cities and towns if it is reasonably necessary

and proper for carrying on the business for which the corporation was chartered or licensed. This exception involves a question of fact to be determined upon a trial of the merits.

SUMMARY OF THE ARGUMENT

Point I.

The case is not within the equity jurisdiction of the Federal Court.

Point II.

An heir cannot, in an action for a declaratory judgment, attack a devise to a charitable corporation, under the law of Oklahoma, upon the ground that it is incapable of taking and holding real estate.

Point III.

The corporate residuary devisees under decedent's will are not expressly and utterly forbidden by the Constitution and the Statutes of Oklahoma from taking, acquiring, holding or owning the land in controversy.

Point IV.

The final decision of the court below should have been stayed until the relevant state issues can be determined by the state courts of Oklahoma.

SUPPORTING BRIEF AND ARGUMENT

Point I.

The case is not within the equity jurisdiction of the Federal Court.

The county courts of Oklahoma have exclusive original jurisdiction of probate matters. They have authority to probate wills, to hear contest of wills and to transact all

business appertaining to the estates of deceased persons, including settlement, partition, and distribution of estates.

The action is to annul and declare void the residuary clause of the will, and declare that decedent died intestate as to certain property, and is one, therefore, merely supplemental to the probate proceedings, and cognizable only by the County Court, and is not within the equity jurisdiction of the Federal Courts.

—*Blue et al.* v. *Murray* (Okla.), 260 P.2d 1069;

Wallace v. *Hill*, 207 Okla. 411, 249 P.2d 452;

Bryan v. *Seiffert*, 185 Okla. 496, 94 P.2d 526;

Dillard v. *Franklin*, 177 Okla. 34, 57 P.2d 629;

In re Broderick's Will, 21 Wall. 503, 22 L. Ed. 599;

Sutton v. *English*, 246 U.S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664.

The Court of Appeals has recognized this rule.

—*Porter* v. *Bennison*, 180 F.2d 523;

Rice et al. v. *Sayers et al.*, 198 F.2d 724;

Ferguson v. *Patterson*, 191 F.2d 584.

The last case sustains federal jurisdiction in cases arising in Oklahoma, but recognizes lack of jurisdiction in Kansas, Nebraska, Colorado and Texas. The statutes in all of these states relating to probate jurisdiction, considered in above cases, are very similar in their provisions to the statutes of Oklahoma.

Article VII, Constitution of Oklahoma, Secs. 12 and 13, provides:

"Section 12. The County Court, co-extensive with the county, shall have original jurisdiction in all probate matters. * * *

"Section 13. The County Court shall have the general jurisdiction of a Probate Court. It shall probate wills * * * transact all business appertaining to the estates of deceased persons, * * * including * * * settlement, partition, and distribution of the estates thereof."

Title 58, Oklahoma Statutes Annotated, Sec. 1, as far as is pertinent, provides:

"The county court has probate jurisdiction, and the judge thereof power, which must be exercised in the cases, and in the manner prescribed by statute:

"1. To open and receive proof of last wills and testaments, and to admit them to proof and to revoke the probate thereof, and to allow and record foreign wills.

"2. To grant letters testamentary, of administration and of guardianship, and to revoke the same.

"3. To appoint appraisers of estates of deceased persons.

"4. To compel executors, administrators and guardians to render accounts.

"5. To order the sale of property of estates, or belonging to minors.

"6. To order the payment of debts due from estates.

"7. To order and regulate all distribution of property or estates of deceased persons.

"8. To compel the attendance of witnesses and the production of title deeds, papers, and other property of an estate, or of a minor.

"9. To exercise all the powers conferred by this article or by other law.

"10. To make such orders as may be necessary to the exercise of the powers conferred upon it."

Title 58, O.S.A., Sec. 632, provides:

"In the order or decree, the Court must name the persons or the proportions or parts to which each shall be entitled * * * such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal."

Title 20, O.S.A., Sec. 271, provides:

"The County Court, co-extensive with the county, shall have original jurisdiction in all probate matters * * *." (This provision is the same one as contained in Section 12, Art. VII of the Constitution.)

Title 20, O.S.A., Sec. 275, provides:

"In all cases arising under the probate jurisdiction of the county court, appeals may be taken from the judgments of the county courts to the district court of the county, in the manner provided by law and in all cases appealed from county court to the district court, the cause shall be tried *de novo* in the district court upon questions of both law and fact."

Title 84, O.S.A., Sec. 251, is in part as follows:

"The county court having jurisdiction to settle the estate of any deceased person is hereby granted original jurisdiction to hear and determine the question of fact as to the heirship of such person and a determination of such fact by said court shall be conclusive evi-

dence of said question in all courts of this state. Provided, that appeals may be taken from said county court within the time and in the manner provided by law as in other probate matters. If no appeal is taken the judgment of the county court shall be final, and in all cases appealed from the county court when a final determination thereof is had, same shall be a final determination of such fact of heirship * * *."

The County Court has exclusive jurisdiction and control of probate proceedings subject only to the right of appeal to the District Court.

—*King* v. *Hepburn, District Judge,* 121 Okla. 275, 24 Pac. 924;

Swain, Judge, et al. v. *Swan, Judge,* 147 Okla. 33, 294 Pac. 153.

The determination of who the heirs are, and decree distribution of the estate, are probate question of which the County Court has exclusive jurisdiction, and the District Court is without jurisdiction of a suit to quiet title to real property.

—*Draughan et ux.* v. *Wright,* 200 Okla. 198, 219 P.2d 921;

Dillard et al. v. *Franklin,* 177 Okla. 34, 57 P.2d 629.

Writs of prohibition have been issued by the Supreme Court of Oklahoma to prohibit the District Courts from interfering with the jurisdiction of the County Courts in the settlement of estates.

—*State ex rel. Morrell* v. *Worten, District Judge,* 161 Okla. 130, 17 P.2d 424;

State ex rel. Cavett et al. v. *Douglass, District Judge,* 187 Okla. 272, 102 P.2d 856.

In the latter case the Supreme Court held:

"Where administration proceedings in the estate of a deceased person are pending in a county court having jurisdiction of the settlement thereof, and a period of three years has not elapsed since the death of the intestate without there having been a decree entered in the county court judicially determining the heirs of the deceased, a district court is without jurisdiction to entertain an action instituted by one who claims to be an heir of the deceased for the purpose of procuring a judicial determination of her heirship to the deceased."

In the body of the opinion the Court says:

"By the statute the county court is granted original jurisdiction to determine the question of fact as to the heirship of the deceased person, and we cannot deprive such court of such jurisdiction by permitting the claimants to file individual and separate actions in the district court for the procurement of separate and distinct adjudications of the question of fact 'as to the heirship of such person.' This would defeat the purpose of the statute. *We therefore hold that the proper forum for determination of the issues presented in the petition of Alice Green is the county court of Oklahoma county, and that the district court is without jurisdiction to entertain her action*" (Emphasis supplied).

The Oklahoma Supreme Court has further held that it is the mandatory duty of the County Court, under 58 O.S.A., Sec. 632, to determine who are the beneficiaries, the

part to which each is entitled, and the nature and extent of their interest in the estate; *and in so doing it has jurisdiction to construe and interpret the will under which the property is distributed.*

—*In re Everheart's Estate*, 208 Okla. 101, 253 P.2d 174.

The action instituted in the District Court is an attempt to retry a contest on the will, of which the County Court has exclusive original jurisdiction. Contestant has raised the identical question in the County Court by an amendment to his objection to admission of will to probate (R. 13). In that amendment he alleges that the devise in paragraph 20 of the last will and testament of Birdine Fletcher is invalid because the devisees have no legal capacity to accept the devise therein attempted to be made. Almost the identical question was under consideration in *Sutton* v. *English, supra.* There the objects of the action were to treat joint wills of Moses Hubbard and Mary Jane Hubbard as ineffective to dispose of their community property; to have the will of Mary Jane Hubbard, at least to the extent that a certain paragraph thereof gave and bequeathed the residue of her property to Cora D. Spencer, decreed not to be a testamentary disposition of that portion of the estate of the testatrix which had been community property; and to have the property constituting the separate estate of Mary Jane Hubbard and not having been effectively devised by her, be decreed to have passed to complainants as her heirs at law. It was held that the county courts in Texas had the general jurisdiction of probate courts, with power to probate wills, grant letters testamentary or of administration, and settle accounts of executors or administrators; that

the county courts had exclusive original jurisdiction to entertain proceedings seasonably instituted to contest the validity of wills; that an essential feature of the cause of action in the bill was to annul the will of Mary Jane Hubbard, which under the laws of Texas was merely supplemental to the proceedings for the probate of her will and was cognizable only in the County Court; and that therefore the cause of action pleaded in the bill was not within the jurisdiction of the courts of the United States.

Point II.

An heir cannot, in an action for a declaratory judgment, attack a devise to a charitable corporation, under the law of Oklahoma, upon the ground that it is incapable of taking and holding real estate.

It is well settled law in Oklahoma that only the state can question the right of a corporation to acquire or hold real estate.

—*Lynch* v. *Perryman*, 29 Okla. 615, 119 Pac. 229;

State ex rel. Short, Atty. Gen. v. *Benevolent Inv. & Relief Ass'n et al.*, 107 Okla. 228, 232 Pac. 35;

Local Inv. Co. v. *Humes*, 51 Okla. 251, 151 Pac. 878;

Brown v. *Capps*, 164 Okla. 91, 22 P.2d 1008;

Union Trust Co. v. *Hendrickson*, 69 Okla. 277, 172 Pac. 440;

Texas Company v. *State ex rel. Coryell*, 198 Okla. 565, 180 P.2d 631;

Kurz v. *Farmers United Cooperative Pool*, 199 Okla. 224, 184 P.2d 790.

In the *Texas Company* case the Court said:

"The effect of the constitutional limitation and the language of the statute making unlawful the acquiring of land in violation of such limitation is to make voidable and not void conveyances made to corporations in contravention thereof, and voidable only in a direct proceeding by the state. In recognition of this rule, which is of general acceptation (19 C. J. S. 687, Sec. 1113), this court, in *State ex rel. Short, Atty. Gen.* v. *Benevolent Inv. & Relief Ass'n et al.*, 107 Okla. 228, 232 P. 35, 37 A. L. R. 190, quotes with approval from *Louisville School Board et al.* v. *King*, 127 Ky. 824, 107 S. W. 247, 15 L. R. A. (N. S.) 379, the following statement:

" 'The general rule is that, although a corporation may be disabled or forbidden by the organic or statute law of a state from holding land except for particular purposes, or from holding land beyond a prescribed limit or quantity, yet, if it does hold land in the face of such disabilities or prohibitions, its title will be good except as against the state alone; and that it will be deemed to have a good title until its title is invalidated in a direct proceeding instituted by the state for that purpose; and this rule prevents the title of the corporation from being assailed by its grantor or grantee.'

* * * * * * * *

"The application here of the doctrine so announced could properly be made only on the theory that the source of the corporation's power is to be found in the '2nd exception.' Such is not the case. The source of the corporation's power is to be found in its charter and, as heretofore stated, is coextensive with the legitimate purposes of its creation. The inhibition against creating or licensing corporations to buy and sell real estate other than in incorporated communities, and against such corporations buying or selling rural lands, has no reference to corporations licensed for a different purpose, unless it were shown such corpora-

tions were holding lands not necessary for their legitimate purposes and in contravention of said inhibition.

"The inhibition against holding more land than necessary and proper, which is applicable here, is in legal effect an express declaration of the limitation otherwise implied. The power of the corporation to acquire and hold land consistent with its purpose is unquestionable."

Point III.

The corporate residuary devisees under decedent's will are not expressly and utterly forbidden by the Constitution and the statutes of Oklahoma from taking, acquiring, holding, or owning the land in controversy.

The Charter of the Sisters of St. Francis, the parent corporation, has for its objects, "to found and maintain a religious, benevolent order; and establish, conduct, and maintain convents, hospitals and schools of nursing in connection with such hospitals, and also schools and institutions for teaching; to foster, promote and encourage intellectual and spiritual culture and arts and sciences; to teach and encourage handicraft and other useful industries; to take by deed, devise or decree in its corporate capacity, any property, real or personal, for the uses and purposes herein enumerated" (R. 17-18).

Article XXII, Section 2 of the Constitution, and Section 20 of the Business Corporation Act, Title 18, O.S.A. 1.20, both recognize beyond question that a corporation may take, acquire, hold, or own real estate outside cities and towns, if it is reasonably necessary and proper for carrying on the business for which the corporation was chartered or licensed.

Title 18, Sections 588 and 589, O.S.A., were enacted by the Legislature in 1915, and form a part of Chapter 14, Title 18, dealing with religious, educational and benevolent corporations, and when the Legislature was considering the Business Corporation Act it refused to disturb said chapter, and gave protection to such corporations in Sections 3 and 9 of said Act.

The title to the Act passed in 1915, now Sections 588 and 589 of Title 18, O. S. A., is as follows:

> "An act to authorize Benevolent corporations to take lands by gift or devise for benevolent purposes and to carry out the object *and purposes of their organization and maintenance*" (Emphasis supplied).

These statutes reflect the policy of the State of Oklahoma toward religious, educational and benevolent corporations, even to the extent of "the object and purposes of their organization *and maintenance.*" That policy has been a continuous one down to this time.

The opinion of the lower court, if allowed to stand, will overthrow a policy that has been recognized by Oklahoma not only since the creation of a state, but from its organization as a territory in 1889. Schools, churches, lodges, hospitals and benevolent corporations of all kinds have become adjusted to the policy formulated and put into effect by the Territory of Oklahoma, and continued by the State, as shown by the Act passed in 1915 extending the policy permitting such corporations to take lands by gift or devise for benevolent purposes, and to carry out the object and purposes of their organizations, *and maintenance.* By that Act the Legislature recognized the necessity of maintaining such worthy corporations.

The court below is not in a position to say that all devises to corporations of land outside the limits of municipalities are *per se* void, as the decision holds. There is no outright prohibition. Whether such real estate is being held in violation of the constitutional and statutory prohibitions can only be resolved by a hearing on the facts of each particular case, including the instant case, wherein it must be determined the specific use the corporation intends to make of such realty and the oil, gas, and mineral rights thereunder in connection with the purpose for which the corporation exists. Consequently, any attack upon an otherwise valid devise goes to the question of challenging the corporation's right to hold, thus voiding the devise and cannot be deemed void *ab initio* or void *per se*. This principle has been established unqualifiedly by the Oklahoma Supreme Court in *Pelter* v. *Sacred Heart Catholic Church, Inc.*, 186 Okla. 46, 96 P.2d 24.

The court below by its decision has established a precedent which if permitted to stand will utterly prohibit a charitable or religious corporation from receiving real estate by devise regardless how worthy the cause and how directly the use of such real estate is related to the purposes for which the corporation is organized. For example, this ruling, which in effect makes all devises outside the limits of municipalities *per se* void, will preclude a religious corporation from acquiring real estate by devise to be used to establish a place of rural residence for under privileged boys or girls, or for summer camps used for religious education, etc., where such activity is positively and properly a legitimate part of the purpose for which the religious corporation exists; such a ruling flies directly into the teeth of the substantive law of the State of Oklahoma which in

the *Pelter* case expressly ruled that the intent of the corporate officers was material in determining whether such real estate was necessary and proper; the Court cannot arbitrarily say the devise of real estate, improved or unimproved, is *per se* or *ab initio* void; such must be established by competent evidence.

Point IV.

The final decision of the court below should have been stayed until the relevant state issues can be determined by the state courts of Oklahoma.

The right of the devisees to take under the residuary clause of the will was and is an issue in the County Court. It is the mandatory duty of the County Court under Section 632, Title 58, O.S.A. to construe and interpret the will under which the property is distributed, and the final say under the statutes of Oklahoma should be left to an ultimate decision by the Supreme Court.

—*State of Arkansas, Complainant,* v. *State of Texas et al.,* — U.S. —, 98 L. Ed. 71;

Thompson v. *Magnolia Petroleum Co.,* 309 U.S. 478-484, 84 L. Ed. 876, 60 Sup. Ct. 628;

Railroad Commission of Texas v. *Pullman Co.,* 312 U.S. 496-502, 85 L. Ed. 971, 61 Sup. Ct. 643;

Huddleston v. *Dwyer,* 322 U.S. 232-238, 64 Sup. Ct. 1015, 88 L. Ed. 1246;

Meredith v. *Winterhaven,* 320 U.S. 228-238, 64 Sup. Ct. 7, 88 L. Ed. 9;

Spector Motor Service v. *McLaughlin,* 323 U.S. 101-106, 89 L. Ed. 101, 65 Sup. Ct. 152;

Rescue Army v. *Municipal Court*, 331 U.S. 549-585, 91 L. Ed. 1666, 67 Sup. Ct. 1409;

Propper v. *Clark*, 337 U.S. 472-497, 69 Sup. Ct. 1333, 93 L. Ed. 1480;

Alabama Public Service Com. v. *Southern R. Co.*, 341 U.S. 341-362, 95 L. Ed. 1002, 71 Sup. Ct. 762;

Green v. *Phillips Pet. Co.* (8th Cir.), 119 F.2d 466.

In *City of Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168, 62 Sup. Ct. 986, the Court says:

> "We granted the petition for certiorari, 314 U. S. 604, 62 S. Ct. 301, 86 L. Ed. —, because of the doubtful propriety of the District Court and of the Circuit Court of Appeals in undertaking to decide such an important question of Illinois law instead of remitting the parties to the state courts for litigation of the state questions involved in the case. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971.
>
> "We are of the opinion that the procedure which we followed in the *Pullman* case should be followed here. Illinois has the final say as to the meaning of the ordinance in question. It also has the final word on the alleged conflict between the ordinance and the state Act. The determination which the District Court, the Circuit Court of Appeals or we might make could not be anything more than a forecast—a prediction as to the ultimate decision of the Supreme Court of Illinois. Here as in the *Pullman* case 'a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication.' 312 U.S. at page 500, 61 S. Ct. at page 645, 85 L. Ed. 971."

In *State of Arkansas, Complainant* v. *State of Texas et al., supra,* it was held:

> "The central question which the case tenders is whether the William Buchanan Foundation has authority to spend its funds for furtherance of this Aransas project. That is necessarily a question of Texas law for the Foundation gets its existence and its powers from Texas. Texas courts speak with authority on those issues. Were we to undertake to resolve the questions we might find ourselves in conflict with the courts that have the final say. Moreover litigation is now pending in the Texas courts which will authoritatively determine what the Texas law is. We therefore follow the course we have taken in analogous situations *(cf. Thompson* v. *Magnolia Co.,* 309 U. S. 478, 483; *Herb* v. *Pitcairn,* 324 U.S. 117), and continue the present motion until the litigation in the Texas courts has been concluded. If that litigation resolves the whole controversy, leaving no federal questions, there will be no occasion for us to proceed further" (Emphasis supplied).

The opinion of the court below is in conflict with *Williams* v. *Virginia Military Institute et al.,* 198 F.2d 980, District of Columbia Circuit. In that case the facts are:

> "Action for judgment declaring the Virginia Military Institute, named as a residuary legatee, was not capable of taking bequests under the law of Virginia and that accordingly plaintiff, as next of kin, should take as upon an intestacy. A United States District Court for the District of Columbia, dismissed the action for lack of jurisdiction over the Institute, and the plaintiff appealed. The Court of Appeals, Washington, Circuit Judge, held that the judgment of dismissal must be affirmed, but solely on the ground that, in the appropriate exercise of the court's discretion, relief by

way of declaratory judgment should have been denied."

The Court held:

"Courts have a broad measure of discretion in deciding whether to grant declaratory relief. Where a court has doubt as to its own jurisdiction, but sees another forum whose jurisdiction is clear, it may be moved to decline to entertain an action for a declaratory judgment. That is the situation which confronts us here.

* * * * * * * *

"Issues which throw doubt on the jurisdiction of this court will not arise if the action is brought in a Virginia court. And the remaining questions—including the basic one whether the Institute is capable of taking bequests under Virginia law—are far more appropriate for decision by the Virginia courts than by the courts of this jurisdiction: they involve, exclusively Virginia law and local Virginia policy. These considerations, we think, are persuasive that if the trial court had considered the question of discretion, discretion should have been exercised unfavorably to the granting of the declaratory relief requested. We do not reach the jurisdictional issues. 'The judgment of dismissal below must therefore be affirmed, but solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of a declaratory judgment should have been denied * * *.' *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293, 301, 63 S. Ct. 1070, 1074, 87 L. Ed. 1407."

See also *Williams* v. *Protestant Episcopal Theological Seminary in Virginia et al.,* 198 F.2d 595.

We respectfully submit that:

(1) The case does not come within the equity jurisdiction of the Federal Court.

(2) That the action is in the nature of a retrial of the contest of the will.

(3) That the County Court has jurisdiction to construe and interpret the will when making distribution.

(4) That under the settled law in Oklahoma an heir cannot attack a devise to a corporation upon the ground that it is incapable of taking and holding real estate; that only the state can bring such an action.

(5) That the corporation can take and hold realty under the devise in the will.

(6) That final decision should be held in abeyance until the relevant state issues are determined by the Supreme Court of Oklahoma.

Respectfully submitted,

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John B. Dudley

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April, 1954.

APPENDIX

APPENDIX

APPENDIX

STATE STATUTES INVOLVED

Probate Jurisdiction

Article VII, Constitution of Oklahoma, Sections 12 and 13, provides:

"Section 12. The County Court, co-extensive with the county, shall have original jurisdiction in all probate matters * * *.

"Section 13. The County Court shall have the general jurisdiction of a Probate Court. It shall probate wills * * * transact all business appertaining to the estates of deceased persons, * * * including * * * settlement, partition, and distribution of the estates thereof."

Title 58, O. S. A., Section 1, as far as pertinent, provides:

"The county court has probate jurisdiction, and the judge thereof power, which must be exercised in the cases, and in the manner prescribed by statute:

"1. To open and receive proof of last wills and testaments, and to admit them to proof and to revoke the probate thereof, and to allow and record foreign wills.

"2. To grant letters testamentary, of administration and of guardianship, and to revoke the same.

"3. To appoint appraisers of estates of deceased persons.

"4. To compel executors, administrators and guardians to render accounts.

"5. To order the sale of property of estates, or belonging to minors.

"6. To order the payment of debts due from estates.

"7. To order and regulate all distribution of property or estates of deceased persons.

"8. To compel the attendance of witnesses and the production of title deeds, papers, and other property of an estate, or of a minor.

"9. To exercise all the powers conferred by this article or by other law.

"10. To make such orders as may be necessary to the exercise of the powers conferred upon it.

* * * * * * * *"

Title 58, Section 632, provides:

"In the order or decree, the Court must name the persons or the proportions or parts to which each shall be entitled * * * such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal."

Title 20, Section 271, provides:

"The County Court, co-extensive with the county, shall have original jurisdiction in all probate matters * * *." (This provision is the same one as contained in Section 12, Art. VII of the Constitution.)

Title 20, Section 275, provides:

"In all cases arising under the probate jurisdiction of the county court, appeals may be taken from the judgments of the county courts to the district court of the county, in the manner provided by law and in all cases appealed from county court to the district court, the cause shall be tried *de novo* in the district court upon questions of both law and fact."

Title 84, Section 251, is in part as follows:

"The county court having jurisdiction to settle the estate of any deceased person is hereby granted original jurisdiction to hear and determine the question of fact as to the heirship of such person and a determination of such fact by said court shall be conclusive evidence of said question in all courts of this state. Provided, that appeals may be taken from said county court within the time and in the manner provided by law as in other probate matters. If no appeal is taken the judgment of the county court shall be final, and in all cases appealed from the county court when a final determination thereof is had, same shall be a final determination of such fact of heirship * * *."

Religious, Educational and Benevolent Corporations' Right to Take and Hold

Article XXII, Section 2, Oklahoma Constitution, as far as pertinent, provides:

"(1st Prohibition) No corporation shall be created or licensed in this State for the purpose of buying, acquiring, trading or dealing in real estate (1st Exception) other than real estate located in incorporated cities and towns and as additions thereto; (2nd Prohibition) nor shall any corporation doing business in this State buy, acquire, trade or deal in real estate for any purpose (1st Exception) except such as may be located in such towns and cities and as additions to such towns and cities, (2nd exception) and further except such as shall be necessary and proper for carrying on the business for which it was chartered or licensed; * * *."

Title 18, Oklahoma Statutes Annotated, Chapter 14, Sections 541 through 591, deals with religious, educational and benevolent corporations.

Section 543 provides:

"All such corporations may hold all the property of the association owned prior to incorporation, as well as that acquired thereafter in any manner and transact all business relative thereto; but no such corporation shall own or hold more real property than may be reasonably necessary for the business and objects of the said association."

Section 562 provides:

"The members of any church or religious society, not less than three, who by its rules, usage and general discipline, or otherwise, do not desire to organize and become incorporated under the foregoing provisions relating to corporations may organize and become corporate, capable of suing and being sued, holding, purchasing and receiving title to real estate and other property by devise, gift, grant or other conveyance, with power to mortgage, sell or convey the same or any part, parcel or portion thereof, by adopting and signing articles containing:

"First. The name of the church, society, association or corporation, its general purpose and plan of operation and its place of location.

"Second. The terms of admission and qualifications of membership, and the selection of officers and the filling of vacancies, and the manner in which the same is to be governed and managed."

Section 581 provides:

"The following associations for benevolent and charitable purposes may become incorporated, as provided in this Article, to-wit:

"1. To establish and maintain hospitals and infirmaries for the cure of the sick and support of the aged and indigent, and asylums for orphans.

"2. For the mutual assistance of the members in time of sickness or necessity, and to provide a fund for this purpose by contributions of the members thereof from time to time and for the like incidental benevolent purposes.

"3. To establish and maintain lodges, chapters and encampments, of fraternities, or associations commonly know as Free Masons, the Independent Order of Odd Fellows, Good Templars, Sons of Temperance, and other like benevolent orders or societies.

"4. To establish and maintain fire companies in any incorporated city or town."

Section 588 provides:

"That any benevolent corporation, including chartered fraternal, grand and subordinate lodges and societies, are hereby empowered to receive, either by way of gift, purchase, grant, devise or by will, real or personal property, and to hold the same, and dispose of the same in the carrying out of the purposes of the corporation, society or lodge."

Section 589 provides:

"Before being competent to so receive such property, such society shall obtain a charter as a benevolent corporation in the manner provided by law from the Secretary of State, and elect trustees, who may be the same trustees already elected under their fraternal rules, and whose by-laws may, so far as they do not contravene the statute laws of the state, be substituted for the by-laws required to be adopted upon obtaining a charter."

Title 84, O. S. A., Section 45, provides:

"A testamentary disposition may be made to any person capable by law of taking the property so dis-

posed of, except that no corporation can take under a will, unless expressly authorized by its charter or by statute so to take."

Business Corporation Act

The Business Corporation Act passed in 1947 forming a part of Title 18, O. S. A., provides in Section 1.20:

"a. No corporation of any sort, whether coming within the general scope of this Act or not, shall, except as herein provided, own, hold, or take any real estate located in this State outside of any incorporated city, or town, or any addition thereto.

"b. Nothing in this Act shall be construed as prohibiting the owning, holding, or taking of:

"(1) *Such real estate as is necessary and proper for carrying on the business for which any corporation has been lawfully formed or domesticated in this State;* * * *" (Emphasis supplied).

Section 3 of said Act, as far as applicable, provides:

"The provisions of this Act shall be applicable to every private corporation, profit or non-profit, stock or non-stock, now existing or hereafter formed or domesticated under the laws of this State, and all securities thereof, except and only to the extent that such corporation be expressly excluded from the operation of this Act or portions hereof, *or there be special provisions in relation to any class of corporations inconsistent with provisions of this Act, whereupon such special provisions shall govern as to such class of corporations*" (Emphasis supplied).

Section 9 of said Act provides:

"Any corporation, except corporations created for the purpose specifically prohibited by Article XXII,

Section 2, of the Constitution of Oklahoma, and those excluded from the terms of this Act by the provisions of Section 3 hereof, may be formed hereunder for any lawful purpose or purposes; *provided, that in all instances where other statutes prescribe a special procedure for incorporation for designated purposes, corporations being created for such purposes shall be formed under such statutes and not under this Act*" (Emphasis supplied).

In the draftsman's note following Section 9, the following explanation is found.

"The intent of the draftsman was to make the provision as to ownership of land as broad as the constitution limitation permits. Thus, construction of Const. Art. XXII, Sec. 2, fixes this limitation. See annotations Okl. Const., Art. XXII, Sec. 2."

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No. 677

In the Supreme Court of the United States

OCTOBER TERM, 1953

W. H. WILSON, Executor of the Estate of Birdine Fletcher, Deceased, and SISTERS OF ST. FRANCIS, a corporation,
Petitioners,

VERSUS

A. J. SIMLER,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

STATEMENT

Birdine Fletcher died testate in Oklahoma City on July 13, 1952. After directing the payment of mass offerings, and the disposition of some personal property, she bequeathed and devised all the rest of her estate, including some oil producing land, to one hospital and a convent in Missouri and one hospital in Oklahoma, all owned and

operated by Sisters of St. Francis, a corporation organized under the laws of Missouri and domesticated in Oklahoma. She bequeathed to her brother, A. J. Simler, of Little Rock, Arkansas, the sum of One Dollar. When the will was offered for probate he filed a contest on various and sundry grounds, among which was the right of Sisters of St. Francis to take and hold real property outside the corporate limits of a city, and after a hearing by the County Court, the will was admitted to probate. He appealed to the District Court. While the case was pending on appeal in the District Court, and after contestant had filed an amendment in the County Court to his objections to the probate of the will, questioning the right of Sisters of St. Francis to take and hold real property outside the corporate limits of a city, he filed an action in the United States District Court asking that the residuary clause of the will be declared void for want of capacity of the devisee to receive, own, and accept the same, and alleged that the County Court had no authority or power to construe or interpret said will.

The United States District Court dismissed the complaint upon the ground that only the State can question the right of a corporation to take and hold real property, and that the plaintiff contestant was not the proper party to maintain the action.

The Court of Appeals reversed the trial court holding that the heir can maintain the suit, which was the only question considered by the trial court.

Intervening Circumstances

Since the filing of the petition for writ of certiorari an opinion by the Supreme Court of Oklahoma rendered on March 30, 1954, *In re Fletcher's Estate, Simler* v. *Wilson, Executor, et al.,* sustaining the judgments of the County Court and the District Court in admitting to probate the will of Birdine Fletcher, has become final. On April 26, 1954, A. J. Simler filed a waiver of his right to file petition for rehearing and asked that the mandate issue forthwith, which was done and the same was filed in the District Court on April 27, 1954, and was spread of record April 30, 1954.

On April 7, 1954, there was filed in the County Court the final account of the executor with the petition for distribution of said estate in accordance with the terms of the will of Birdine Fletcher, and the same is now set for hearing and final disposition on May 13, 1954. To said final account and petition for distribution A. J. Simler has filed in said cause an answer and objections to the executor's final account and petition for distribution, and prays for the distribution of the land in question to himself, together with all income accrued from said land from July 13, 1952, the date of the death of Birdine Fletcher, based upon the opinion and judgment of the Court of Appeals rendered November 9, 1953.

OPINIONS BELOW

The opinion of the District Court is reported in 110 F. Supp. 761. The opinion of the Court of Appeals is reported in 210 F.2d 99.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

I.

The question is not within the equity jurisdiction of the Federal Court.

II.

The opinion is in conflict with decisions of the Tenth Circuit and the Supreme Court of the United States.

III.

The opinion is in conflict with the decisions of the Supreme Court of the State of Oklahoma.

REASONS FOR REHEARING AND FOR GRANTING THE WRIT

I.

The Federal Court was without jurisdiction to hear the case.

II.

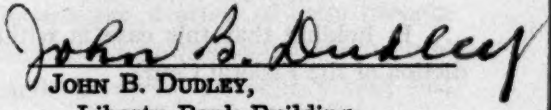
The opinion is in conflict with decisions of the Tenth Circuit and the Supreme Court of the United States.

III.

The opinion is in conflict with decisions of the Supreme Court of Oklahoma.

Wherefore, it is respectfully submitted that this petition for rehearing for a writ of certiorari to review the judgment of the Court of Appeals of the Tenth Circuit should be granted.

FRED E. SUITS,
Liberty Bank Building,
Oklahoma City, Oklahoma;



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Oklahoma City, Oklahoma,

Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

DECISIONS BELOW

The opinion of the District Court is reported in 110 F. Supp. 761. The opinion of the Court of Appeals is reported in 210 F.2d 99.

SPECIFICATIONS OF ERROR

The Court of Appeals erred:

I.

In holding that this case is within the equity jurisdiction of the Federal Court.

SUMMARY OF THE ARGUMENT

Point I.

The Federal Court is without equity jurisdiction to hear the case.

BRIEF AND ARGUMENT

Point I.

The Federal Court is without equity jurisdiction to hear the case.

The County Court has general jurisdiction of a probate court, and the transaction of business appertaining to the estates of deceased persons, including settlement, partition, and distribution of the estates thereof. Sections 12 and 13,

Article VII, Okla. Const.; 58 Okla. Stat. Ann., Sec. I; *Dillard* v. *Franklin,* 177 Okla. 34, 57 P.2d 629. It has original, exclusive jurisdiction subject only to the right of appeal to the District Court. *King* v. *Hepburn,* 121 Okla. 275, 249 Pac. 153; *Swain* v. *Swanson,* 147 Okla. 33, 294 Pac. 153. The determination as to who the heirs are is a probate question of which the County Court has exclusive jurisdiction. *Draughan* v. *Wright,* 200 Okla. 198, 191 P.2d 921; 58 Okla. Stat. Ann. 632. The District Courts are without original jurisdiction to determine heirs and the interest of the claimant herein, and decree a distribution of the estate. *Bingham* v. *Horn,* 123 Okla. 193, 252 Pac. 847.

In *Bingham* v. *Horn, supra,* a group of heirs brought suit in the District Court alleging ownership of six twenty-seconds of certain lands involved. Decedent's will had been admitted to probate, and said heirs contended that upon the death of testator, without issue, the lands descended one-half to the heirs of decedent's wife who had predeceased him (the plaintiffs), and one-half to the heirs of decedent, and alleged that the will of decedent was null and void and prayed that the purported will, in so far as it may purport to pass title to that portion of said property remaining after the administration which would go to the heirs of decedent's wife, Sange Walker, be held not valid, void, and of no effect, and that the executor be required to turn over to the plaintiffs their proportional part of the estate. The Court held:

> "Where a will has been duly admitted to probate in the county court, *the district courts of this state are without original jurisdiction to determine heir-*

ship and the interest of the claimant heirs, and decree a distribution of the estate."

The Court in that case further said:

*"To determine the petition stated a cause of action, would, in effect, be conferring upon district courts jurisdiction in probate matters, concurrent with the county courts, in direct conflict with the Constitution of the state. The district court would have to determine the value of the estate; and perhaps appoint appraisers; determine who were heirs and the interest due each, and that there were no creditors. This would be usurpation of the jurisdiction conferred exclusively upon the county courts, * * *"* (Italics supplied).

Approved in *State* v. *Worten*, 161 Okla. 130, 131, 17 P.2d 424. *Dillard* v. *Franklin, supra. Draughan* v. *Wright, supra.*

The County Court has jurisdiction to determine who are the beneficiaries, the part to which each is entitled, and the nature and extent of their interest in the estate, and in so doing it has jurisdiction to construe and interpret the will under which the property is distributed.

—*In re Everheart's Estate*, 200 Okla. 101, 253 P.2d 174;

Porter v. *Hansen*, 190 Okla. 429, 124 P.2d 391.

The opinion of the Court is in conflict with the following cases of the Tenth Circuit:

—*Porter* v. *Bennison*, 180 F.2d 523.

The above case holds that the District Courts of Nebraska under their general grant of equity jurisdiction do not have original jurisdiction to entertain a proceeding in equity to

declare a purported will to be a forgery, to vacate probate of such a will and to charge those deraigning title under such will trustees *ex maleficio* for benefit of complainants.

It was also held that the United States Court for Colorado, in the exercise of its general grant of jurisdiction "* * * did not have jurisdiction to entertain the suit in equity pleaded in the amended complaint."

—*Rice* v. *Sayers*, 198 F.2d 724.

In the above case it is held that the Federal Courts do not have equity jurisdiction in Kansas:

> "Where state court of original general jurisdiction has original jurisdiction of actions to contest wills, the federal district court sitting in such state, other jurisdictional prerequisites being present, has jurisdiction of such actions, but where exclusive original jurisdiction of actions to contest wills is vested in the probate courts of state and no original jurisdiction of such actions is vested in the courts of general original jurisdiction of such state, a federal court sitting in such state is without jurisdiction of such an action."

The opinion of the Court is in conflict with the following decisions of the Supreme Court of the United States:

—*In re Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599;

Sutton v. *English*, 246 U.S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664.

Sutton v. *English* presents a state of facts somewhat analogous to the facts in the case at bar:

"* * * There all of the heirs at law of Moses Hubbard and Mary Jane Hubbard, deceased, except Cora D. Spencer, filed in the United States Court for Texas their bill in equity. Cora D. Spencer was joined as a party defendant. The bill set up diversity of citizenship and the fact that the amount in controversy exceeded that which was requisite for jurisdiction. The objects of the action were to treat the joint will of Moses Hubbard and Mary Jane Hubbard as inefficacious to dispose of their community property; to set aside a judgment said to have been obtained in the district court of the state by English and others, devisees under the will, establishing their title to the community property as against Mary Jane Hubbard; to have the will of Mary Jane Hubbard, at least to the extent that a certain paragraph thereof gave and bequeathed the residue of her property to Cora D. Spencer, decreed not to be a testamentary disposition of that portion of the estate of the testatrix which had been community property; and to have the property constituting the separate estate of Mary Jane Hubbard and not having been effectively devised by her, be decreed to have passed to complainants as her heirs at law. It was held that the county courts in Texas had the general jurisdiction of probate courts, with power to probate wills, grant letters testamentary or of administration, and settle accounts of executors and administrators; that the county courts had exclusive original jurisdiction to entertain proceedings seasonably instituted to contest the validity of wills; that an essential feature of the cause of action stated in the bill was to annul the will of Mary Jane Hubbard, which under the laws of Texas was merely supplemental to the proceedings for the probate of her will and was cognizable only in the county court; and that therefore the cause of action

pleaded in the bill was not within the jurisdiction of the courts of the United States" *Porter* v. *Bennison, supra.*

The action in this case is to annul the will of Birdine Fletcher as to her residuary estate, which, like the laws of Texas, is merely supplemental to the proceedings for the probate of her will and is cognizable only in the County Court. That Court now has before it, ready for consideration, and set for May 13, 1954, a petition for distribution, and it is the mandatory duty of that Court to determine who are the beneficiaries, the part to which each is entitled, and the nature and extent of their interest in the estate, and in so doing it has jurisdiction to construe and interpret the will under which the property is distributed.

More than that, the respondent, before filing his action in the United States District Court, invoked the jurisdiction of the County Court by filing the following Amendment to his Objections to Admission of Will to Probate:

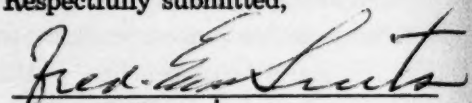
> "That the alleged bequest and devises contained in Paragraphs 17, 18, 19, and 20 of the alleged Last Will and Testament of Birdine Fletcher filed herein for Probate, dated the 9th day of July, 1952, are invalid because the devisees and Legatees therein named have no legal capacity to accept the gifts and devises therein attempted to be made."

CONCLUSION

We feel justified in asking this Honorable Court to grant this petition for rehearing, and that we are duty bound to present the chain of events that have transpired

since our original petition for certiorari was filed, and that a speedy hearing can be and will be had in the County Court on petition for distribution.

Respectfully submitted,



FRED E. SUITS,
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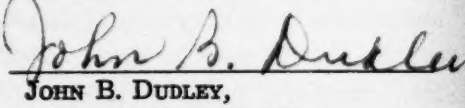

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Attorneys for Petitioners.

CERTIFICATE

This is to certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay; and is based on a change of conditions by reason of intervening circumstances which it is believed are substantial and of controlling effect.

FRED E. SUITS.